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| IN THE MATTER OF<br>STEVEN P. PERSKIE<br>JUDGE OF THE SUPERIOR COURT | : SUPREME COURT OF NEW JERSEY<br>: ADVISORY COMMITTEE ON<br>: JUDICIAL CONDUCT<br>: DOCKET NO. ACJC 2009-003<br>:<br>: RESPONDENT'S POST-HEARING<br>: BRIEF |

## I. PROCEDURAL HISTORY AND SUMMARY OF ARGUMENT

This is a judicial disciplinary matter. Respondent Steven P. Perskie served as Superior Court judge from 1982 to 1989, and again between 2001 and 2010. He retired February 1, 2010.

In 2005 and 2006, Judge Perskie presided over a case called Kaye v. Rosefielde in the Atlantic County Superior Court. This matter arises out of that case.

The ACJC issued its Formal Complaint against Judge Perskie on September 9, 2009. The complaint contained three counts.

Count I alleged that Judge Perskie's relationship with Frank Siracusa, a potential witness in the Rosefielde case, created a conflict of interest that required recusal; and that

Judge Perskie's failure to recuse himself on that basis violated R. 1:12-1 and Canons 1, 2A and 3(C)(1) of the Code of Judicial Conduct.

Count II alleged that Judge Perskie exhibited a "lack of candor" when he testified about the Rosefielde matter at his tenure hearing before the Senate Judiciary Committee in October 2008, in violation of Canons 1 and 2(A) of the Code of Judicial Conduct.

Count III alleged that Judge Perskie created the appearance of impropriety by twice visiting the Kaye v. Rosefielde trial after having recused himself, in violation of Canons 1, 2A and 2B of the Code of Judicial Conduct.[1]

The ACJC held a two-day hearing in this matter on July 19 and July 20, 2010. At the hearing's conclusion, the Committee invited the parties to submit post-hearing briefs. R. 2:15-14(g).

Judge Perskie submits this brief in response to that invitation. He asks the Committee to recommend that Counts I and II of the complaint be dismissed. His testimony before the

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[1] Each Count also alleged a "violation" of R. 2:15-8(a)(6). That rule does not provide standards of conduct for judges to follow and therefore cannot be the source of a violation. In re Boggia, ___ N.J. ____, ____, 2010 WL 2900994 at *5 n.1 (2010). Accordingly, the Committee should dismiss those charges, or strike them from the complaint.

Judiciary Committee was the product of an understandable failure of memory, not a lack of candor or an intent to mislead. In the extraordinary circumstances of the Rosefielde case, his failure to make Siracusa the basis of his eventual recusal did not constitute unethical conduct.

Judge Perskie concedes that his visits to the Rosefielde trial were ill-considered in the context of that case. He will therefore leave resolution of Count III to the Committee, but asks it to consider why he visited the Rosefielde trial, how he conducted himself, and the absence of any evidence that his visits affect the proceeding.

II. PROPOSED FINDINGS OF FACT[2]

1. Steven P. Perskie is a member of the New Jersey bar, and was admitted to the practice of law in 1969. Stipulation at ¶1.

2. Perskie was elected to the New Jersey General Assembly in 1971, as one of Atlantic County's two assemblymen. He served three two-year terms there, from 1972 to 1978. T2 167:6-9.

[2] Transcript references are as follows: Tr1: transcript of July 19, 2010, hearing; Tr2, transcript of July 20, 2010, hearing. For testimony other than Perskie's, the witnesses name is in parentheses. Exhibit references are to the parties' Consolidated Exhibits.

3. In 1978, Perskie was elected to the New Jersey State Senate from Atlantic County, and served a full four-year term, from 1978 to 1982. T2 167:9-11.

4. In November 1981, Perskie was re-elected to a second Senate term, which began in January 1982. He resigned after six months to accept an appointment as a New Jersey Superior Court judge. T2 167:12-15.

5. Perskie served as a Superior Court judge until October 1989, when he resigned to accept the position of chief of staff to the Governor of New Jersey. T2 167:15-20.

6. Perskie served in that position for approximately one year, until October 1990, when the governor appointed him chairman of the Casino Control Commission. T2 167:20-24.

7. Perskie served as CCC chairman until May 1994, when he resigned to become vice-president and general counsel of a company that operated casinos in states other than New Jersey. T2 167:25 to 168:3.

9. After two-and-a-half years in that position, Perskie returned to Atlantic City in 1996, where he joined a private law firm and practiced law until 2001. T2 168:3-6.

10. In 2001, Perskie was again appointed a judge of the Superior Court. He was reappointed after seven years, and

served until February 1, 2010, when he retired. Stipulation at ¶3; T2 168:6-11.

11. Frank Siracusa is an insurance broker who owns and operates an insurance agency in Atlantic City. Stipulation at ¶6; P-21 at 3:5-20.

12. Perskie first met Siracusa in approximately 1974, during the first, unsuccessful referendum campaign for casinos in Atlantic City. Tr2 48:14-21; P-21 at 5:3-5.

13. In the 1970s through 1981, Siracusa was a political supporter of, and fund-raiser for, Perskie. He contributed to Perskie's Assembly campaigns in 1975 and 1977, and was a co-treasurer of the 1977 campaign. He was a fund-raiser for Perskie in 1981 when Perskie ran for Senate. Tr2 48:25 to 50:14; P-21 at 17:18-22; P-24.

14. During the second casino referendum campaign in 1976, Siracusa was a member of the Committee to Rebuild Atlantic City, a group that worked with Perskie to bring casinos to Atlantic City. Tr2 49:20 to 50:5; P-21 at 11:3 to 12:5.

15. In the mid- to late-'70s, Perskie and Siracusa were among a large group of investors in an Atlantic City restaurant. The restaurant was not successful. Perskie surrendered his interest in 1980 or '81. Tr2 53:4-24. See also P-21 at 19:13 to 22:15.

16. In the mid-'70s, after his previous insurance agent went out of business, Perskie began placing his personal insurance with Siracusa's agency. That business relationship continues to this day, and consists primarily of Perskie receiving bills and paying them. Perskie has dealt with staff regarding his insurance needs. Tr2 50:15 to 53:1. See also {21 at 6:24 to 8:5.

17. According to Perskie, during the period between 1974 and 1981, while Perskie was involved in elective politics, Siracusa was a "very close associate" and "friend." J-6 at 23:10-12. See Stipulation at ¶12(d).

18. That relationship with Siracusa ended when Perskie took the bench in 1982. Since that time, his contact with Siracusa has been limited to the following:

A. Perskie maintains his insurance at Siracusa's office, in the manner described above. He has no direct contact with Siracusa. T2 56:4; 59:3-7.

B. As a judge, Perskie occasionally - two or three times a month - saw Siracusa eating lunch at the same restaurant where Perskie ate lunch, and exchanged greetings with him. They never shared a meal. Tr2 54:19 to 55:5; 56:6-10; 57:6 to 58:2.

C. In the mid-'90s, Perskie occasionally served as a substitute fourth in a regular bridge game in which Siracusa

participated. This occurred between four and eight times a year, and continued until the late '90s, when the game disbanded. It ceased before Perskie returned to the bench in 2001. Tr2 55:6 to 56:3; 58:14 to 59:2; 59:10-25.

19. Beginning in February 2005 and extending through October 6, 2006, Perskie presided over the matter of Bruce Kaye, et al. v. Alan P. Rosefielde, et al., Docket No. ATL-C-000017-05, in the Superior Court of New Jersey, Atlantic County, Chancery Division. Stipulation at ¶4.

20. The Rosefielde complaint was filed in February 2005. Its gravamen was Alan Rosefielde's termination of employment from a company in which Bruce Kaye was a principal. Stipulation at ¶5. The case included affirmative claims by both plaintiff and, by way of counterclaim, defendant. See P-1 (Tabs 1, 3, 7, 8, 10, 11); R-1; R-6; R-9.

21. The Rosefielde case was contentious and hotly contested. It presented Perskie with significant management challenges during the year and eight months it was before him. Most of these involved discovery disputes and disputes over proposed amendments to the pleadings. Tr2 65:14 to 70:6. For example:

A. On October 12, 2005, Perskie had to conduct an item-by-item review of document requests to resolve disputes between the litigants. See J-4 at 17-47.

B. On January 3, 2006, Perskie had to order several of the litigants' counsel to appear in court to address claims that requested documents had not been produced. R-4 at 4:7-16.

C. On that same date, Perskie imposed a sanction of $1,000 per day on plaintiff for each day certain tax returns were not produced. R-4 at 17:19 to 18:7.

D. On February 6, 2006, Perskie conducted a hearing at which he had to resolve a series of motions involving discovery disputes, amendments of pleadings and requested sanctions. See R-5.

E. On May 26, 2006, Perskie had to resolve discovery disputes involving the payment of an expert witness for a deposition, and a continuation of the dispute over document production, which in turn required him to order the parties to revise the deposition schedule. J-5 at 25:15 to 35:24; 35:25 to 71:11.

F. On July 21, 2006, Perskie had to resolve disputes over compliance with his order requiring the parties to agree on a deposition schedule by June 30. Defense counsel waited until the afternoon of the 30th to propose a schedule, and added new

potential deponents, prompting plaintiff's counsel to seek to limit the number of depositions and to move for sanctions. R-8 at 4:11 to 35:13.

G. On September 8, 2006, Rosefielde sought to file an amended counterclaim without leave of court, requiring Perskie to dismiss the counterclaim as improperly filed; the dismissal was without prejudice to an appropriate application to refile it. J-7 at 2:23 to 10:3.

22. During this process, Perskie repeatedly expressed his frustration with the parties' incessant pretrial wrangling, particularly given the quality of the law firms and attorneys involved. See, e.g., R-4 at 13:19 to 14:7; 104:1-14; R-5 at 5:13 to 6:6; 18:8 to 19:10; J-5 at 61:10-18 ("I have this terrible headache, and it's not physiological, it's psychological"); 71:9-11 ("[W]e'll schedule ourselves for another torture session"); R-8 at 7:5-13 ("[T]his file makes me sick"); 37:9-19; J-6 at 18:2-10 ("I have struggled mightily to invest this case with some sense of professional decorum and either you or your clients have been just as determined not to do so"). See T2 126:24 to 127:12.

23. While he had the Rosefielde case, Perskie tried to manage it as he had learned to manage all his cases: he sought to defer substantive decisions until after discovery was

complete, and not to make definitive substantive decisions until it was necessary to do so. T2 60:20 to 62:24.

24. With one exception, involving Rosefielde's unlicensed practice of law in New Jersey, for which the parties stipulated the operative facts, Perskie made no definitive substantive rulings in the Rosefielde matter. T2 62:24 to 65:13. See J-5 at 4:9 to 6:16; 22:16 to 24:4.

25. Although in keeping with his case management philosophy, he did not make a final decision or alert the parties, Perskie came to believe relatively early in his handling of the Rosefielde case that Rosefielde would likely be entitled to a jury trial on several of the causes of action alleged in his counterclaim. Tr2 71:3-21; 74:9 to 78:18.

26. Frank Siracusa was not a party in the Rosefielde case, but he was indirectly implicated in one issue. Rosefielde alleged in his counterclaim that improper political pressure was brought to maintain Kaye's corporate insurance at Siracusa's agency, and that Rosefielde was fired, in part, because he objected to that gambit. R-1 at 13-14, ¶¶26-28; and R-6 at 13, ¶¶25-27; R-9 at 14-16, ¶¶27-37.

27. In his pleadings, Rosefielde did not make any detailed allegations about Siracusa's involvement until August 23, 2006, when he filed an amended counterclaim supplementing the

allegations in the initial counterclaim, which was filed in May 2005 and re-filed as part of an amended answer on March 2, 2006. Compare R-9 at 14-16, ¶¶27-37, with R-1 at 13-14, ¶¶26-28; and R-6 at 13, ¶¶25-27.

28. Rosefielde's counterclaim was the subject of a motion to dismiss filed in July 2005. The issue presented - whether as a matter of law Rosefielde was an employee within the meaning of CEPA - did not implicate Siracusa. On August 8, 2005, Perskie denied the motion without prejudice, solely on the ground that factual disputes prevented its resolution at that time. J-3 at 25:16 to 27:15.

29. Perskie first became aware of Siracusa's connection to the Rosefielde case at the October 12, 2005, hearing, when Siracusa's name was mentioned in one of the document requests. Tr2 45:8 to 46:9; J-5 at 42:3 to 43:20.

30. At that hearing, Perskie told the parties he knew Siracusa, that for many years he had obtained his personal insurance through Siracusa's office and that he continued to do so. He also said that "many years ago, Siracusa was associated with me in some of my endeavors in public office." Stipulation at ¶8(a-c); J-4 at 43:21 to 44:9.

31. Perskie further said that although he did not know Siracusa's role in the case, he did not believe his "historic

relationship" with Siracusa would pose a problem for him as judge. He further indicated that the parties would need to make their own determinations on that issue. Stipulation at ¶8(d-e); J-4 at 44:13-25.

32. On February 7, 2006, Perskie signed an order that several depositions, including Siracusa's, occur on dates certain. The order was a consent order. Stipulation at ¶10.

33. At the May 26, 2006, hearing, Rosefielde's counsel Steven Fram indicated that Perskie might have to make credibility determinations involving Siracusa, and suggested that in lieu of recusal, Perskie might consider affording the parties a jury trial on the relevant claims. Stipulation at ¶11; J-5 at 73:23 to 74:9; 75:14-20. See Tr2 at 73:1 to 74:13.

34. Fram described the issue as "a miscellaneous issue that may at some point in the future affect the court's thinking" about the length of the trial. He agreed with Perskie that the jury trial issue was not "something [Perskie] need[ed] to decide" then and that it could remain open pending further discussion. He added that Perskie "may want us to give you some more detail - today's probably not the time to do it - about the nature of the transaction and the concerns before you." Stipulation at ¶11; J-5 at 73:23-25; 75:14 to 76:24. See Tr2 121:1 to 123:20.

35. At this hearing, Perskie told the parties that in addition to previously disclosed connections, he, Siracusa and others had been co-investors 30 years previously in an Atlantic City restaurant. He added:

> There is nothing from any of that that from my point of view requires me to recuse on my own motion. But I'm sure I indicated then, and I'll indicate now, if any party has any concerns or questions about it, I'll deal with it.
>
> I don't perceive that there's anything about the nature or extent of my historic relationship with him that would preclude me from making the kind of credibility evaluation of his testimony that I would make of somebody I didn't know.
>
> But I concede that the parties have to be as comfortable about that conclusion as I am. So if anybody has any questions at any point or has concerns about it, I'll be happy to deal with them.
>
> . . . .
>
> And we'll leave the issue open. All I'm saying is that my relationship with him is not such, as it would be, for example, with some other people that I can mention, that I simply would not feel comfortable evaluating their credibility.

Stipulation at ¶; J-5 at 74:10 to 75:13; 76:18-22.

36. At the September 8, 2006, hearing, several significant events occurred. First, during the discussion on the issue of Rosefielde's improperly filed counterclaim, Judge Perskie lost his temper with Rosefielde's counsel, Mr. Fram. When Fram rose

to speak while plaintiff's counsel was speaking, Perskie yelled at Fram to "Sit down." J-6 at 7. See Tr2 126:15 to 129:18.

37. Second, Perskie ruled on Rosefielde's motion for a jury trial on his counterclaim. Perskie denied the motion without prejudice, and made it clear that he was open to revisiting the issue should defendant seek later to raise it. J-6 at 16:18 to 17:10. See Tr2 125:17 to 126:14.

38. Finally, Fram again raised the issue of Siracusa, whom he described as a "pretty important witness." Perskie responded as follows:

> At the appropriate time, and today isn't it, what somebody's going to need to do is essentially summarize whose witness he would be and what the substance of … the testimony that he's presenting … If this is a jury trial and … if I can't get out of it, the fact that I had and have a relationship with him, wouldn't trouble me in the least. If it's a non-jury trial, and I'm trying it, and his credibility is a factor I would need to determine, that's something I need to think about in whatever the context in which it's presented is.

Stipulation at ¶12(a),(c); J-6 at 23:16, 24:4-15. Additionally, Perskie described Siracusa as a "very close associate" and "friend" of his in the 1970s and early 1980s when Perskie was involved in politics, and disclosed that he occasionally encountered him when having lunch. Stipulation at ¶12(d-e); J-6 at 25:5-15.

39. Fram then indicated he wanted to "tee this issue up in the form of a motion." Perskie agreed he should do so. Stipulation at 12(f); J-6 at 26:10-19. When Perskie then indicated that he did not currently have enough information to decide whether to recuse himself, Fram replied: "That's why I want to get the whole context before Your Honor so you can make that decision." Stipulation at 12(g-h); J-6 at 27:8-16. See Tr2 123:21 to 125:16.

40. His outburst at Fram greatly disturbed and upset Perskie. He had never done anything like that before. After the hearing, Perskie spent much time thinking about why the outburst occurred. He concluded that, without being aware of it, he had gradually lost his confidence in, and his objectivity toward, Fram. He decided he had to recuse himself for that reason, independent of any issue involving Siracusa. Tr2 127:1-12; 129:17 to 130:4; 130:19 to 134:19.

41. Rosefielde filed his recusal motion on September 21, 2006. The motion was returnable on October 6, 2006. Perskie reached his recusal decision before Rosefielde filed his motion. P-1 (Tab 72); J-7; Tr2 1345 20-22.

42. On October 3, 2006, an article about the Rosefielde case appeared in the Atlantic City Press. Fram was quoted in the article; plaintiff's counsel sought to have the court

sanction Fram for his comments. See R-12; R-13. Perskie read the article when it appeared. He was "amazed" and "dismayed" by Fram's comments, and it "underscored" his concerns about Fram and the need to recuse himself. J-7 at 8:24 to 9:4; Tr2 137:5 to 138:10.

43. At the October 6, 2006, hearing Perskie recused himself on his own motion. He noted his "inappropriate" reaction to Fram at the September 8 hearing and apologized to him for it. He cited his "significant concerns with the manner in which the case has been handled" as the reason for recusing himself, and said those concerns "have at least a potential for affecting my objectivity in future decisions." Stipulation at ¶13(e). J-7 at 7:17 to 9:5. See Tr2 135:5 to 137:4; 138:11-14.

44. Before recusing himself, Perskie denied Rosefielde's motion for recusal. In doing so, he stated: "Even if [Siracusa] were to be called as a witness, my relationship with him in the past would not, in my view, preclude my making any necessary determinations with regard to his credibility." Perskie also said that he felt "perfectly comfortable retaining responsibility for the matter even if Mr. Siracusa were to testify." In the course of this discussion, Perskie also mentioned that he had occasionally played bridge with Siracusa

until "a few years ago." Stipulation at ¶13(a-d); J-7 at 6:3 to 7:16. See Tr2 138:17-22.

45. Perskie later came to understand that he had mishandled Rosefielde's recusal motion by deciding it on the merits rather than denying it as moot. Furthermore, in an attempt to "take ownership" of his failure to control his temper, and to make clear his own responsibility for the recusal, Perskie "went overboard" in stating why his relationship with Siracusa would not require recusal. Tr2 140:6 to 144:24.

46. The Rosefielde matter was subsequently transferred to Judge William Nugent, before whom the parties tried the case. Stipulation at ¶14. See Tr2 145:1 to 146:19.

47. After having recused himself, Perskie appeared twice in Judge Nugent's courtroom during the Rosefielde trial. He first appeared on the afternoon of May 16, 2007, a Wednesday. He sat in the back right of the courtroom. Perskie did not speak to anyone, but remained for approximately one hour and observed a portion of the testimony being offered by the plaintiff Bruce Kaye. He left the courtroom when someone from his chambers came to get him. Stipulation at ¶17. Tr2 151:3 to 152:24; R-32 (P0035).

48. Perskie's second appearance in Judge Nugent's courtroom occurred on the morning of May 22, 2007, a Tuesday. Perskie went to hear the testimony of plaintiff's legal malpractice expert, Carl Poplar, Esquire. Tr2 25:10 to 31-23 (D'Amato); 35:19 to 42:3 (Poplar); 81:21 to 86-7 (Barbone); 97:21 to 99:22 (Jacobs); 152:25 to 153:4. See R-21.

49. On this occasion, the courtroom was more crowded. Poplar was on the witness stand. Perskie sat in the back left of the courtroom, near the door. Perskie saw Paul D'Amato, an attorney he knew, sitting on the other side of the courtroom. D'Amato left while Poplar was testifying; he and Perskie exchanged comments about both being there to see Poplar. Tr2 30:1-9 (D'Amato); 153:4 to 154:18; 177:13-24.

50. Perskie stayed in the courtroom for about 45 minutes, until the Judge Nugent took his morning recess. At the recess, Edwin Jacobs, one of plaintiff's counsel, walked past Perskie and out of the courtroom. He said hello to Perskie as he passed. Tr2 84:18 to 22 (Barbone); 99:24 to 100:22 (Jacobs); 154:10-18.

51. Perskie then approached Louis Barbone, plaintiff's other counsel, at the front of the courtroom, and asked to see a document Barbone had been using in his direct examination of Poplar. Barbone gave it to him, Perskie looked at it briefly,

and then left the courtroom. He left the courtroom alone. Tr2 81:21 to 86:7 (Barbone); 154:19 to 155:14.

52. Perskie did not go into Judge Nugent's courtroom on May 21, 2007. He spent that entire morning in his courtroom or chambers, dealing with two matters, Starkman v. Hark and Shindel v. Phila. Park Race Track, that were on his trial list for that day. J-8; J-9; R-22; R-25; Tr2 6:15 to 13:16 (Maudsley); 156:19 to 160:11.

53. Perskie did not have an extended conversation with Jacobs, in the courtroom during a recess in the Kaye v. Rosefielde trial, in which Jacobs boasted about his examination of Rosefielde. No such conversation ever occurred. Tr1 131:1-8 (Slimm); 134:21-25 (Slimm). Tr2 86:8-19 (Barbone); 100:23 to 101:14 (Jacobs); 155:22 to 156:17.

54. Perskie was interested in the legal malpractice issue presented by the Rosefielde matter. He went into Judge Nugent's courtroom solely because he was interested in this issue. He went to hear Poplar testify on the issue (and, on the first occasion, to hear the plaintiff testify for factual background). Perskie had previously sat in on other judge's trials many times before, sometimes with his law clerk, because he wanted to learn something or because he was particularly interested in some aspect of a case. Tr2 147:13 to 148:15; 180:12-16.

55. Perskie's appearances in the back of Judge Nugent's courtroom had no effect on Judge Nugent's handling of the Kaye v. Rosefielde trial, or on any of the decisions he reached. J-2; See R-17 (Verdict Following Non-Jury Trial and supplemental Decision on Counsel Fees and Punitive Damages); R-18 at 54:12 to 56:25.

56. Rosefielde's counsel did not object to Perskie's appearances, or bring them to the attention of Judge Nugent, at the time they occurred. Even after Perskie's second appearance - during which Rosefielde claims Perskie and Jacobs had an extended conversation about Jacobs' examination of Rosefielde - Rosefielde's counsel did not make a contemporaneous objection or even a contemporaneous record of the occurrence. Instead, Rosefielde did not raise the issue of Perskie's appearances until July 30, 2007, when he filed post-trial motions after having lost the trial. Tr1 91:7 to 92:3 (Fram); 99:10 to 101:7 (Fram); 144:18 to 146:11 (Rosefielde); 147:1 to 149:15 (Rosefielde).

57. Frank Siracusa did not testify as a witness at the Kaye v. Rosefielde trial. Defendants served a subpoena on him but did not call him. The Siracusa subpoena was issued on May 25, 2007, and served on Siracusa on May 29, 2007, seven days

after Perskie's last appearance in Judge Nugent's courtroom. R-16.

58. No reasonable basis exists to conclude that Perskie's appearances in Judge Nugent's courtroom influenced defendant's trial strategy or case presentation. See Paragraphs 55-57, and citations therein.

59. On October 16, 2008, Perskie appeared before the New Jersey Senate Judiciary Committee and offered testimony under oath with regard to his reappointment, with tenure, as a Superior Court Judge. Stipulation at ¶21; J-1.

60. At that hearing, a committee member questioned Perskie about his failure to recuse himself from the Rosefielde Matter and his appearances in the back of Judge Nugent's courtroom during the Kaye v. Rosefielde trial. Stipulation at ¶22; J-1.

61. With regard to the recusal issue, Perskie testified as follows:

> [W]hen the matter was first presented to me, it was suggested that there was an individual [Siracusa] who was not a party to the case. He was neither a plaintiff nor a defendant, nor was he going to be a witness. His name was going to be used or referred to in the course of the testimony with respect to one or several issues.
>
> I indicated that if he, indeed, had been a party or a witness in the case that I would not hear the case. But because he was neither going to be a witness nor a party, there was no reason at that point that I

> should not hear the case. And at that point, on that basis, I declined to excuse myself from the case. Later on, for unrelated reasons having to do with matters that made me uncomfortable, on my own motion I excused myself from the case and it was assigned to another judge.

Stipulation at ¶23; J-1 at 4-5.

62. Upon further questioning by the committee member, Perskie said:

> Because the individual in question was never going to be a witness in the case. His name was going to be referred to by some of the witnesses. But his credibility and his interests were never going to be involved in the case. If they had been - I put it on the record. If he were going to be a witness and I had to evaluate his credibility, or if he were going to be a party and interests that he had were at stake, I should not be in the case. And I said that. But he was not.

Stipulation at ¶24; J-1 at 5.

63. With regard to his appearances in the back of Judge Nugent's courtroom during the Kaye v. Rosefielde trial, Perskie testified to the committee as follows:

> The case presented some very interesting questions, at least for me - intellectual questions having to do with the responsibilities of a lawyer and a claim of fraud on behalf of a lawyer, things that, frankly, I was interested in because they're not quite run-of-the-mill.
>
> When the case came up for trial, as it happened, that particular week I was just finishing a jury trial. So when the jury

> was out deliberating, and I was waiting for the verdict, I had some time. So I made two visits to the courtroom where the case was being tried, and I sat in the back, inconspicuous - I spoke to nobody - watched one of the witnesses testify for a while. Then I got my verdict, so I had to leave.
>
> Two or three days later, when the other witness that I wanted to hear - the expert on legal fraud - the testimony I really wanted to hear. When he came in to testify, I had nothing that morning on my schedule. So I went down and spent an hour or so in the back of the courtroom, watching the testimony. That's what I did.

Stipulation at 25; J-1 at 5-6.

64. Perskie's 2008 statements to the Judiciary Committee about recusal conflict with what he told the parties to Kaye v. Rosefielde in October 2006. Tr2 161:23 to 162:18.

65. When he testified to the committee, Perskie did so from memory, two years after the fact. He did not have the benefit of transcripts, which were not a part of the court files. Perskie's memory failed him. He conflated several things - his misstatements about the case in October 2006, his conclusion about the need for a jury trial, the fact that the trial had ended and Siracusa had not been a witness - and as a result, simply got it wrong. Perskie thought what he remembered was accurate, but it was not. Tr2 162:16 to 165:6; 182:4 to 183:12.

66. Perskie had no intention to mislead the Judiciary Committee, or to be less than candid with it, when he testified before it in 2008. Tr2 165:7-10.

67. Perskie correctly indicated to the committee that his first appearance in Judge Nugent's courtroom ended when he was called back to his chambers. He mistakenly remembered that he was called back to receive a verdict, something that had actually occurred the day before. The mistake was inadvertent. Tr2 152:4-21; 165:11-20.

68. Perskie correctly told the committee that his second visit to Judge Nugent's courtroom was to hear the testimony of Carl Poplar, plaintiff's expert witness. Tr2 165:21 to 166:7. See Paragraphs 48-52, above, and citations therein.

III. LEGAL ARGUMENT

Judicial misconduct must be proven by clear and convincing evidence. R. 2:15-15(a). Clear and convincing evidence

> produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence, so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the precise facts in issue.

In re Seaman, 133 N.J. 67, 74 (1993), quoting In re Boardwalk Regency Casino License Application, 180 N.J. Super. 324, 339 (App. Div. 1981), modified, 90 N.J. 361 (1982).

This standard is high, but necessary when judicial misconduct is involved. "The seriousness of such a claim, and the possible consequences to the judge, require that we have a clear and accurate understanding of facts that may give rise to discipline." In re Williams, 169 N.J. 264, 271-72 (2001).

The rules governing judicial conduct must be broadly construed, "consistent with 'their purpose of maintaining public confidence in the judicial system.'" In re Boggia, ___ N.J. at ___, 2010 WL 2900994 at *5, quoting In re Blackman, 124 N.J. 547, 554 (1991). Nonetheless, not every failure of a judge to conform to the Code's standards amounts to culpable judicial misconduct. In re Alvino, 100 N.J. 92, 97, 102 (1985). "[W]e do not discipline for mere errors in judicial activity or professional activities. Rather, the disciplinary power is ordinarily reserved for conduct that is marked with moral turpitude and thus reveals a shortage in integrity and character." In re Mathesius, 188 N.J. 496, 524 (2006); see In re Mattera, 34 N.J. 259, 270 (1961).

"The ultimate answers to the questions of whether a judge is guilty of misconduct, and if so, what discipline is appropriate, are based on a judgment that turns on the particular circumstances of each case." In re Thompson, 100 N.J. 198, 118 (1985). The "particular circumstances" of this

case require the committee to recommend dismissal of Counts I and II. With respect to Count III, Judge Perskie acknowledges that he should not have visited the Rosefielde trial; he will leave resolution of Count III to the Committee.

A. Judge Perskie Did Not Exhibit a "Lack of Candor" Before the Judiciary Committee; His Statements Reflected a Failure of Memory, After Two Years, That Did Not Violate His Ethical Obligations.[3]

Count II of the complaint alleges that Judge Perskie's "lack of candor" before the Judiciary Committee "impugned the integrity of the Judiciary" and thereby violated Canons 1 and 2(A) of the Code of Judicial Conduct. Those canons require a judge to "uphold the integrity and independence of the judiciary," and to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." See In re Subryan, 187 N.J. 139, 152-53 (2006).

Count II rests on the inconsistency between what Judge Perskie told the committee in October 2008 and what he told the parties in Kaye v. Rosefielde in October 2006. Judge Perskie concedes that the two statements, made two years apart, are inconsistent. Nevertheless, because the inconsistency did not

[3] Given the seriousness of Count II's allegations, - which constitute an unwarranted attack on Judge Perskie's integrity - this Argument will address those claims first.

result from a lack of candor, the Committee should recommend dismissal of the charge.

Candor is "unreserved, honest, or sincere expression; frankness; candidness." Webster's Third International Dictionary at 326 (1966).[4] Accordingly, the claim that Judge Perskie exhibited a lack of candor that impugned the judiciary necessarily implies he was dishonest or less than frank with the Judiciary Committee. That, in turn, implies some degree of deliberation, or intent to mislead.

This record does not show, clearly and convincingly or otherwise, that Judge Perskie intended his remarks to mislead the committee or that he was less than honest in his presentation. To the contrary, the evidence establishes that Judge Perskie simply made a mistake - that he trusted his memory and his memory failed him.

That mistake is understandable in the circumstances. As he told the Committee, Judge Perskie testified from memory, two years after the fact. He testified without the benefit of transcripts, which the court did not maintain. He testified well after the Kaye v. Rosefielde trial had concluded. Frank Siracusa had not been a witness at that trial.

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[4] Similarly, the American Heritage Dictionary (4th ed. 2000) defines "candor" as "frankness or sincerity of expression; openness." Id. at 271.

Most significantly, Judge Perskie testified about a case in which he had mishandled the recusal issue by overreacting to his unprecedented outburst at defense counsel. Upset at himself, and determined to take sole responsibility for what had happened, he mistakenly and unnecessarily repudiated any suggestion that his connection with Siracusa justified recusal. His conviction that the matter would otherwise have gone to a jury, unarticulated to the parties at the time, exacerbated that overreaction.

By the time he went before the Judiciary Committee, these things had conflated themselves in Judge Perskie's mind. That caused him to mis-remember what had occurred and what he had said in October 2006. When he testified to the Judiciary Committee, he believed he remembered correctly, but he did not. As he told this Committee, "I just simply said it wrong." Tr2 162:24-25.

At this Committee's heaering, Presenter's counsel made much of how "specifically" Judge Perskie testified to the Judiciary Committee, intimating thereby that he knew he was testifying inconsistently. See Tr2 183:13 to 184:25. But that "specificity" does not betoken lack of candor; instead, it illustrates how strong a grip Judge Perskie's mistaken memory had on him.

Judge Perskie acknowledges that "judicial misconduct involving dishonesty" merits serious discipline. In re Alvino, 100 N.J. at 97. But this is not such a case. For example, it is not a case like In re Williams, supra in which a judge first misled police and then "came dangerously close to impersonating a police officer" during a phone call. 166 N.J. at 273-74. Nor is it like In re Hardt, 72 N.J. 160, 164-65 (1977), in which the evidence belied the judge's claim that the fraudulent dismissal of a traffic summons was merely a "farce" or a "joke."

Here, by contrast, Judge Perskie is guilty only of excessive reliance on his memory - a flaw that makes him human but does not rise to the level of judicial misconduct. Accordingly, the Committee should recommend dismissal of Count II of the complaint.

B. Given the Case Management Problems and the Manner in Which the Recusal Issue Developed, Judge Perskie's Failure to Recuse Himself Earlier Did Not Constitute Unethical Conduct.

Count I of the complaint alleges that Judge Perskie's "long-standing business and personal relationship" and "prior dealings" with Frank Siracusa created a conflict of interest that required him to recuse himself. His failure to do so, the complaint alleges, violated R. 1:12-1(f) and Canon 3(C)(1) of the Code of Judicial Conduct.

Both the Rule and the Canon require a judge to recuse himself, either on his own motion or in response to a party's motion, whenever his impartiality might reasonably be questioned. See R. 1:12-2. The standard for recusal is whether "a reasonable, fully informed person ha[s] doubts about the judge's impartiality." DeNike v. Cupo, 196 N.J. 502, 517 (2002); see also State v. McCabe, 201 N.J. 34, 44 (2010).

In this matter, Judge Perskie did ultimately recuse himself, although not immediately and not because of his connections to Siracusa. Nevertheless, in the circumstances of this case, Judge Perskie's handling of the recusal issue did not rise to the level of an ethical violation. The Committee should so find, and should recommend dismissal of Count I.

This is so for several interrelated reasons.

First, the evidence here establishes that Judge Perskie's relationship with Siracusa was far more attenuated than the complaint suggests. As a practical matter, Perskie's contacts with Siracusa ceased when he first took the bench in 1982, 23 years before he was assigned to hear Kaye v. Rosefielde.

Thenceforth, the relationship consisted of the following: 1) Perskie maintained (and maintains) his personal insurance at Siracusa's agency, where he dealt only with staff; 2) Perskie occasionally saw Siracusa at the same restaurant at lunch - an

unavoidable event in a town as small as Atlantic City; and 3) in the '90s, Perskie occasionally served as a substitute fourth in Siracusa's bridge game.

Except for these three relatively minor connections, the relationship ceased to exist two decades before Kaye v. Rosefielde. Judge Perskie described the relationship as "historic," Tr2 48:4-7, and that is a fair characterization.

Second, Judge Perskie disclosed his relationship with Siracusa in October 2005, when he first learned of Siracusa's connection to the case. And although he did so in general terms, he made the lineaments of that relationship clear. Furthermore, he consistently told the parties his assessment of that relationship was subjective, and he expressly invited the parties to ask "questions" or voice "concerns" about the relationship. See, e.g., J-5 at 74:10 to 75:13.

Contrary to the grievant's suggestion of intentional deception, the nature of the disclosure reflects the highly attenuated nature of the relationship, and explains why Judge Perskie described it generally, and revealed the details piecemeal. No one seeking to disguise the nature of a relationship would disclose it as Judge Perskie did.

Third, the recusal issue arose and was addressed in the context of Judge Perskie's general approach to case management.

As he explained to this Committee, that practice was to defer substantive decisions and allow the factual assertions to develop fully during discovery. He followed that practice n Kaye v. Rosefielde, making only one definitive "substantive" decision - which the parties essentially conceded - while he had the case. His other rulings either involved discovery issues, or were expressly "without prejudice" - his way, as he told this Committee, of deferring decisions until the facts were fully developed.

Furthermore, that practice served the Rosefielde matter well. It allowed Judge Perskie to deal with the contentious discovery disputes that marked the pre-trial proceedings. It also allowed development of facts germane to the recusal issue.

For example, it was not until August 23, 2006 that Rosefielde was able to set forth, in an amended counterclaim, the details of Siracusa's alleged involvement in the matter. Only after he had obtained these facts did his counsel call Siracusa a "pretty important" witness." That occurred on September 8, 2006 - less than a month before Judge Perskie recused himself. In other words, factual discovery helped frame the recusal issue.

Recusal is not a matter to be undertaken lightly or hastily. "[J]udges are not free to err on the side of caution;

it is improper for a court to recuse itself unless the factual bases for its disqualification are shown." State v. Marshall, 148 N.J. 1, 276 (1997). A judge considering recusal must obtain all the relevant facts - not just those pertinent to his own involvement, but those pertinent to the case as well.

Fourth, the parties, including defendants, acceded to this approach. The record reflects the parties' understanding that this issue would "ripen" over time; on May 26, 2006, defense counsel expressly indicated that the issue was not ready for decision; and on September 8, he proposed to "tee this issue up." See J-5 at 73:23-25; 75:14 to 76:24; J-6 at 26:10-19. Furthermore, in the course of the proceedings, the recusal issue became intertwined - at the instigation of defense counsel - with whether Rosefielde's claims required a jury trial.

In other words, the parties were always aware of this issue's existence. Judge Perskie had made it clear that he would deal with it, and that all "questions" and "concerns" would be addressed. The parties chose to handle the matter this way.

Defense counsel now claims his approach was prompted by Judge Perskie's failure to fully disclose the details of his relationship with Siracusa. But that claim does not comport with the tenor of the discussions at the various hearings; and

it ignores Judge Perskie's repeated injunctions to the parties that his assessment of the relationship was subjective, that a recusal decision required their input as well, and that they could raise their questions or concerns at any time.

Fifth, by the time the recusal issue "ripened," another issue had intervened. The contentious progress of the case had taken its toll on Judge Perskie, ultimately causing him to lose his temper and yell at defense counsel. In turn, that troubling, unprecedented event caused Judge Perskie to examine his conduct; he concluded that, without his having realized it, he had lost confidence in defense counsel and had to recuse himself on that basis. This unusual sequence of events short-circuited what would have been a forthright and complete airing of the recusal issue.

Sixth, as noted above, Judge Perskie ultimately recused himself after having made only one uncontested, definitive substantive ruling. His other rulings either were expressly without prejudice or involved case management and the resolution of discovery issues.

Given the contentious discovery and his subsequent loss of trust in defense counsel, Judge Perskie's decision to recuse because of his own conduct was not only proper but required. See Pantich v. Panitch, 339 N.J. Super. 63, 71 (App. Div.

2001)(suggesting that "excessive involvement" in pre-trial proceedings requires recusal). Moreover, because he did not decide substantive matters, his failure to recuse himself earlier did not taint the proceeding. Id.

In sum, the recusal issue in the Rosefielde matter could not have been decided hastily, or in a factual vacuum. With the parties' concurrence, Judge Perskie managed the issue and its development until it became ripe for decision. By then however, the contentious pretrial proceedings and Judge Perskie's consequent outburst at defense counsel had created a superseding reason for recusal. Judge Perskie's ultimate decision to recuse for that reason did not adversely affect the case.

In these extraordinary circumstances, the evidence does not clearly and convincingly establish an ethical violation. See In re Thompson, supra. Accordingly, the Committee should recommend dismissal of Count I of the complaint.

C. Judge Perskie's Appearances at Trial, Although Benign in Both Intention and Execution, Were Ill-Considered in the Context of This Case.

Count III of the complaint alleges that by appearing in Judge Nugent's courtroom during the Kaye v. Rosefielde trial after recusing himself, and by speaking to plaintiff's counsel, Judge Perskie violated Canons 1, 2A and 2B of the Code of Judicial Conduct. The essence of the claim is that his

courtroom visits created the appearance of impropriety in the trial process.

"Our rules … require that a judge must avoid all impropriety and appearance of impropriety." In re Boggia, ___ N.J. at ____, 2010 WL 2900994 at *4 (emphasis in original); see In re Blackman, 124 N.J. at 551 ("Improper conduct includes creating or acquiescing in the appearance of impropriety"). Whether conduct creates an appearance of impropriety turns on whether an objective observer would have doubts or concerns on that score. Id. at 552. See also DeNike v. Cupo, supra, 196 N.J. at 517.

Judge Perskie has conceded to this Committee that he should not have gone into Judge Nugent's courtroom, or spoken to plaintiff's counsel, after having recused himself from the Rosefielde case. Tr2 170:4-24; 172:3 to 174:23. In these circumstances, that conduct was ill-considered, and may well have created concerns about the process in a reasonable, objective observer. Accordingly, Judge Perskie leaves to the Committee the evaluation of whether his actions rise to the level of a violation.

Judge Perskie also understands that his motivation for visiting the courtroom bears more on the quantum of discipline to be imposed than on whether a violation has occurred. In re

Mathesius, 188 N.J. 496, 521 (2006); In re Hardt, supra, 72 N.J. at 165. But see In re Thompson, 100 N.J. 108, 118-19 (1985). Nevertheless, he asks the Committee to consider the following:

First, his motive for visiting the trial - to hear the expert testimony of Carl Poplar on the issue of legal malpractice - was benign, if not praiseworthy. The visit was a product of the judge's intellectual curiosity and desire to learn. It was something Judge Perskie had done many times before, both alone and with his law clerks, as an informal sort of "continuing education program."

In the abstract, the ethical propriety of that practice seems, at a minimum, defensible. One can make a strong argument that allowing judges to visit other judges' courtrooms would have a salutary effect on the process. That the particular circumstances of this case may alter that calculus does not invalidate the more general point.

Second, Judge Perskie's visit was executed modestly. He took pains to be unobtrusive. Both times he sat in the courtroom's rear, away from others. He had minimal interaction with those present. He spoke to no one on his first visit. On the second, he exchanged brief greetings with Messrs. D'Amato and Jacobs. He approached and spoke briefly to plaintiff's

counsel, but during a recess and only to see an exhibit - an encounter prompted by his desire to learn.

The record supports these findings and conclusions. Other than the grievant's speculation, nothing here supports the notion that Judge Perskie entered the courtroom to influence the trial's outcome, or to "show solidarity" with plaintiff or Frank Siracusa.

In particular, the evidence establishes that: 1) Judge Perskie's second visit to the courtroom occurred on May 22, 2005, when Carl Poplar was testifying; 2) Judge Perskie did not visit Judge Nugent's courtroom on May 21, 2005; and 3) no conversation, extended or brief, about Rosefielde's examination ever occurred between Judge Perskie and plaintiff's counsel. For whatever reason, Messrs. Fram and Rosefielde are mistaken in their contrary testimony, and this Committee should so find.[5]

Third, nothing in this record suggests that Judge Perskie's visits had any effect on the Kaye v. Rosefielde trial, or on defendants' strategy at that trial. Judge Nugent stated, in both in his denial of defendants' post-trial motion (R-18) and his letter to this Committee (J-2), that Judge Perskie's courtroom visits did not affect his handling of the trial or

[5] In this connection, it is telling that John Slimm, defendants' co-counsel, does not corroborate the testimony of Fram and Rosefielde. See Tr1 131:1-8; 134:21-25.

resolution of the case. His comprehensive and meticulous written opinion in the matter, with its detailed findings about Rosefielde's illegal and unethical activities, makes clear that the record overwhelmingly supported his resolution of the case, including the verdict adverse to defendants. See R-17.

Nor does the record support the claim of Messrs. Fram and Rosefielde that Judge Perskie's appearances demoralized them or altered their trial strategy. They did not contemporaneously object to Perskie's appearances, or put them on the record; they did not even raise them as an issue until after Judge Nugent issued his adverse verdict. Defendants subpoenaed Frank Siracusa a week after Judge Perskie's second appearance, an action inconsistent with their claim that the appearances caused them to abandon their intention to call Siracusa.

Judge Nugent's opinion - which accepts Rosefielde's version of Siracusa's involvement but rejects it as basis for Rosefielde's termination - belies the claim that Judge Perskie's appearances deprived defendants of the ability to call an essential witness. See R-17 at 36-39. The simple truth is that defendants did not call Siracusa because his testimony would not have helped their case.

In sum, Judge Perskie agrees that his decision to visit the Rosefielde trial was ill-considered. He leaves to the Committee

the evaluation of his actions' ethical implications. He asks, however, that in making this determination the Committee consider why he visited the courtroom, how he conducted himself, and the absence of any effect on the proceedings.

D. The Record in This Case, Reviewed Under Appropriate Legal Standards, Militates Against Discipline.

The "single overriding rationale" of the judicial disciplinary system is "the preservation of public confidence in the integrity and independence of the judiciary." In re Seaman, 133 N.J. at 96. Upon a finding of unethical conduct, "the goal is not so much to punish the offending judge as to restore and maintain the dignity and honor of the position and to protect the public from future excesses." In re Subryan, 187 N.J. at 153.

The Committee must undertake "a searching and expansive inquiry" that "carefully scrutinize[s] the substantive offenses that constitute the core of respondent's misconduct, the underlying facts, and the surrounding circumstances." In re Collester, 126 N.J. 468, 472 (1992).

These "surrounding circumstances" include the extent to which the misconduct demonstrates a lack of integrity or probity; whether it constitutes an "impugn" exercise of judicial power that evidences lack of independence or impartiality;

whether it involves a misuse of judicial authority, or is unbecoming and inappropriate for one holding the position of judge; whether it has been repeated; and whether it has harmed others. "Mitigating factors" include whether the misconduct is a first offense; the length and quality of the judge's tenure; his reputation; his commitment to overcoming the fault; the possibility of future misconduct and whether the inappropriate behavior is subject to modification. See In re Seaman, 133 N.J. at 99-100. See also In re Mathesius, 188 N.J. at 524; In re Subryan, 187 N.J. at 153-54.

These factors overwhelmingly favor Judge Perskie. Viewed through the prism of the "clear and convincing" standard, the evidence does not support a finding that Judge Perskie misused the judicial power or displayed a lack of integrity; rather, it reflects, at most, an over-reliance on memory and an instance of poor judgment. Judge Perskie has acknowledged as much to this Committee. Moreover, no evidence exists that this misjudgment harmed others; the issue here is the appearance of impropriety, not its reality.

This proceeding is the only blemish on Judge Perskie's distinguished 30-year career in public service - not only in the judiciary, but in all three branches of state government. His personal and professional reputation is of the highest quality;

his level of professional achievement, extraordinary. Even had he had not retired, one can confidently assert that this conduct would not have repeated itself.

Whether activity rises to the level of unethical conduct and the appropriate level of discipline, if any, both turn ultimately on the particular facts of each case. In re Thompson, supra, 100 N.J. at 118, see also In re Boggia, ___ N.J. at ____, 2010 WL 2900994 at *6 (clear and convincing standard was not met "given the nature of the facts in this case"). In Judge Perskie's case, when viewed in light of the relevant factors and under the appropriate standard of proof, those facts militate against discipline.

IV. CONCLUSION

Judge Perskie's erroneous statements to the Senate Judiciary Committee were the product of memory failure, not a lack of candor. Accordingly, this Committee should recommend dismissal of Count II of the complaint.

Similarly, in the unusual circumstances of the Kaye v. Rosefielde case, Judge Perskie's failure to recuse himself earlier did not rise to the level of an ethical violation. Accordingly, the Committee should therefore recommend dismissal of Count I of the complaint as well.

Judge Perskie acknowledges that his appearances, after his recusal, in Judge Nugent's courtroom were ill-considered and might well have caused an objective observer to have concerns about the trial process. Accordingly, while he respectfully asserts, and asks the Committee to find, that those visits were benign in intention, execution and effect, he leaves resolution of Count III to the Committee.

Dated:
9/7/10

Respectfully submitted,

BARRY, CORRADO, GRASSI & GIBSON, PC

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